In the

Supreme Court of the United States

October Term, 1925.

No. [redacted]348

REALTY HOLDING COMPANY, a Delaware Corporation,
Plaintiff and Appellant,

v.

LAVINA B. DONALDSON,
Defendant and Appellee.

BRIEF FOR PLAINTIFF AND APPELLANT, ON MOTION TO DISMISS OR AFFIRM

JOHN E. BOOD,
Attorney for Plaintiff and Appellant.

[redacted]

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Defendant and Appellee.

BRIEF FOR PLAINTIFF AND APPELLANT ON MOTION TO DISMISS OR AFFIRM.

STATEMENT OF FACTS.

This is a bill in chancery filed by the plaintiff in the District Court of the United States for the Eastern District of Michigan, Southern Division, alleging among other things:

That the plaintiff conveyed to the defendant several tracts of land in the city of Detroit and elsewhere, as security for the performance by the Clifford Land Company of its covenant with the defendant in a certain long term

lease on property in Detroit, to erect upon the said last named premises a building and pay for the labor and material, and that pursuant thereto the Clifford Land Company had erected said building of approximate value of one million two hundred fifty thousand ($1,250,000.00) dollars, and that the same is now ready for occupancy. (Bill of complaint, paragraphs 6 and 7; Record, pages 2 and 3.)

That in violation of the terms of defendant's lease with said Clifford Land Company, and with intent to cheat and defraud the Clifford Land Company and this plaintiff of all rights in the premises, the defendant had refused to perform her covenants in the said lease, thereby disabeling the Clifford Land Company to perform its part in the premises, and that the said defendant was seeking thereby to defraud and deprive the Clifford Land Company and this plaintiff of all rights in the premises, and that in order to protect its said property and interests, the plaintiff had been compelled to and had purchased and taken an assignment of the said lease from the said Clifford Land Company, thereby acquiring all its rights and interest thereunder. (Bill of complaint, Par. 13, R., 5.)

The grounds upon which the jurisdiction of the court were alleged, were the facts that the plaintiff is a corporation organized and existing under the laws of the state of Delaware, and the defendant was a resident and citizen of Detroit, Michigan, and that the property, which is the subject-matter of suit, is located in the territorial jurisdiction of the court. (Bill of complaint, Par. 14, R., 5.)

The plaintiff prays among other things that the court ascertain its rights in the premises, enjoin the defendant from interfering with the execution and completion by the plaintiff of the contract as set forth in the lease, and from taking any advantage by reason of her failure and refusal to perform the covenants therein contained to be performed by her, and that the plaintiff have such further and other relief in the premises as shall be agreeable to equity and good conscience (R., 6).

A copy of the lease is attached to the bill of complaint as Exhibit A (R., 6-23).

The defendant answered and filed a cross-bill, admitting among other things that she had dealt with the plaintiff as a Delaware corporation by receiving conveyance from it of the several properties as alleged in the bill of complaint. (Defendant's answer, Par. 6, R., 26.)

Later the defendant filed a motion to dismiss the bill of complaint on eight several grounds (R., 38-41), to which plaintiff responded by motion to strike the defendant's motion from the files (R., 46-47).

Both motions were heard together and thereupon the court filed an opinion dismissing the bill of complaint on the sole ground that the court had no jurisdiction in the premises, holding that the action was brought by the plaintiff as an assignee of a chose in action from the Clifford Land Company, and as such assignee had no greater rights than its assignor, a corporation and resident in the same state with the defendant (R., 47-49), and immediately entered decree December 12th, 1923, dismissing plaintiff's bill (R., 49).

Thereupon the plaintiff immediately sought an appeal to the United States Circuit Court of Appeals for the 6th Circuit, and was advised by the judges of the Circuit Court of Appeals, that inasmuch as the only question involved was the jurisdiction of the court, the Circuit Court of Appeals was without jurisdiction, and appeal should be taken directly to the Supreme Court of the United States. Thereupon, Hon. Arthur C. Denison, as judge of the Circuit Court of the United States for the 6th Circuit, on December 14th, 1923, entered an order allowing appeal to the Supreme Court of the United States (R., 51), and fixed a day for hearing of the question as to whether the injunction originally granted by the District Court should be continued pending appeal.

By agreement counsel for plaintiff and defendant appeared before Judge Dennison, at Grand Rapids, December 27th, 1923, at which time the defendant insisted that the appeal was frivolous and not prosecuted in good faith, whereupon Judge Denison found that the claim of appeal was not frivolous and ordered bond of ten thousand ($10,000.00) dollars, to protect the defendant pending appeal and continued the injunction.

The judge's opinion and the order entered thereon omitting the titles, are as follows:

OPINION.

(DENISON, CIRCUIT JUDGE.) Upon the application for a continuance of the preliminary injunction pending the appeal to the Supreme Court, my conclusions are as follows:

1. The continuance of such injunction is essential to prevent the destruction of such rights as plaintiff may have.

2. The appeal to the Supreme Court is not frivolous; and plaintiff has a fair right to be heard upon the question presented. If there is error in this conclusion, a motion to dismiss or affirm will prevent any very long delay.

3. Section 18 of the Clayton Act seems to be imperative in requiring plaintiff to give an injunction bond; and this condition, to meet the letter of the statute, must how be insisted upon. However, the amount and condition of the bond are discretionary and the circumstances do not justify a large bond with a condition or absolute guaranty against any possible loss.

4. The only thing the defendant could do with the property would be to rent it to the best possible advantage. So long as plaintiff does this and applies the net proceeds to defendant's benefit, the defendant is not harmed by plaintiff's possession.

5. The theoretically perfect remedy, in order to protect all respective interests, including defendant's, would be a receivership. This might have been ordered

in connection with the injunction. This power is not lost by reaching the conclusion that the court has no jurisdiction; because it has jurisdiction to decide that question and to protect the subject-matter pending its conclusion. Such collateral proceedings as injunction or receivership or accounting, etc., may well remain in the court below even after an appeal from a decree dismissing the bill. It would have been within the power of the District Court if it had allowed this appeal in a court order, to have provided in this same order that there should be a receivership pending the appeal by way of providing the security, which is to be taken in such cases. I think that power still continues—at least providing its continuance is made a condition of the stay on appeal, and plaintiff (the party in possession) accepts that condition.

6. Hence a circuit judge in taking security for a stay upon an appeal which he allows, may provide, if necessary for the protection of the parties, that the District Court may appoint a receiver whenever the security would be otherwise impaired—in a case where a receivership is the obvious and safe method of getting security but is not advisable at the time the stay is granted.

7. The parties seem to agree that a receivership is not advisable on account of the expense and complications involved, if it can be avoided; and that if plaintiff continues the management of the property and can give to defendant the same security she would have by a receivership, it is the more advisable course.

8. The first and second mortgage interests are much greater in amount than defendant's interest. The accruing of liens, taxes and interest vitally affected these mortgages before they reached defendant, and it is unlikely that the representative of the mortgages would sanction any dealing with these matters which would be practically injurious to defendant's interest.

9. Mr. Bushman seems to represent in a practical

way, the mortgage interests and to be a man of responsibility and good standing. It is a reasonable *prima facie* inference that the handling of these matters satisfactorily to him ought to be satisfactory to the defendant.

10. The current situation will therefore be properly met by providing that the plaintiff shall file in this court, within the first ten days of each calendar month, a statement of all receipts and disbursements pertaining to the building during the previous month, together with written memorandum showing approval by Mr. Bushman; and if, at any time defendant, thinks her interests in the property are being materially injured, the District Court may, on her application and as an ancillary proceeding in this cause, appoint a receiver.

11. Under all the circumstances, it is fair to require plaintiff, if it gets its stay, to give an unconditional guaranty for the payment of such ground rent as accrues to defendant during the delay caused by the appeal.

12. I have signed, and file herewith, an order with these provisions.

Dated January 2nd, 1924.

A. C. Denison,
Circuit Judge.

ORDER.

The undersigned, having heretofore allowed an appeal in the Supreme Court in the above entitled cause, and having continued until this time the matter of the stay asked for in connection with the appeal, and having heard the parties thereon, it is now ordered as follows:

1. That the preliminary injunction heretofore allowed herein by the District Court, be continued in force pending and notwithstanding the appeal, until such appeal is disposed of by the Supreme Court or until that court makes some further order in the premises.

2. That such continuance of injunction be upon the condition that within ten days from this date, the plaintiff file with the clerk of the District Court, with surety and in form to be approved by that clerk, a bond in the penal sum of ten thousand dollars ($10,000), running to the defendant and conditioned that the plaintiff will pay to the defendant such ground rent as may accrue to defendant during the time while such injunction continues in force by the effect of this order—such payment to be subject only to such offsets or equitable conditions as may be imposed by the District Court in this cause in proceedings to be taken therein, after the appeal is disposed of and the case remanded.

3. Such continuance is upon the further condition, accepted and agreed to by plaintiff, that it will within the first ten days of each calendar month, file with the clerk of the District Court, a full statement of all receipts and disbursements on account of the building involved in this suit, and accompanied by a written memorandum signed by F. E. Bushman, showing his approval of the matters shown by such account.

4. Such continuance is upon the further condition, accepted and agreed to by the plaintiff, that the District Court may, at any time upon the application of the defendant and upon what seems to the District Court sufficient cause, appoint a receiver for such property for the purpose of insuring the proper protection of all interests pending the appeal.

Dated January 2, 1924.

A. C. Denison,
Circuit Judge.

The bond was immediately furnished as directed, and accounting has since been made faithfully by the plaintiff to date according to the court's order.

In settling the record for appeal, a controversy arose as to including in the record the affidavits of the defendant

attached to their motion to dismiss without giving the plaintiff an opportunity to meet the allegations therein contained, the plaintiff contending that the affidavits were immaterial as they merely raised questions of fact concerning which no proofs had been or could be taken and were not necessary to determine the question of jurisdiction, but finally appellant consented to include them in the record and they are accordingly printed. This statement is made to account for the delay in perfecting the record from January 18th to March 18th.

LAW BRIEF.

Point 1.

This motion is not properly noticed for hearing, the notice of same being served upon this plaintiff and appellant May 19th, 1924, and the hearing noticed for June 2nd, whereas Rule 6 of this court requires the moving party to give the opposite party at least three weeks' notice in such cases.

Point 2.

Answering the first ground in the motion to dismiss that the appeal is frivolous, without merit, and taken for the purpose of delay only, the plaintiff says that when the District Court held the plaintiff's only interest was as assignee of a chose in action, he forgot that the bill is based on the claim admitted by the defendant that several tracts of land in Detroit owned by the plaintiff in fee were conveyed to the defendant merely as security for performance of the Clifford Land Company's covenant to build.

As to the leasehold, the plaintiff is in actual possession and operation of the premises under a present legal estate for years; and as tenant of the ground and owner of the

building erected by the lessee filed this bill is to protect it's estate from threatened invasion and defeat by the fraudulent conduct of the defendant, which is an entirely different matter from suing for judgment on an assigned chose in action. It is in principle squarely within the decisions of this court and the several courts of appeal, maintaining the right of the holder of an estate in land to sue in the United States Court to protect that estate, though his grantor could not have sued there.

Chief Justice Marshall said:

> "It has not been alleged, and certainly cannot be alleged, that a citizen of one state, having title to lands in another is disabled from suing for those lands in the courts of the United States by the fact that he derives his title from a citizen of the state in which the lands lie. Consequently the single inquiry must be whether the conveyance from McArthur to McDonald was real or fictitious. * * * The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different states. * * * A suspicion may exist that it was for McArthur. The court cannot act upon this suspicion."

McDonald v. Smalley, 1 Peters, 620, 623-624.

In one case suit was brought by a lessee against the Mayor of New York on a lease made by a citizen and resident of New York; and it was contended that the lease was made for the sole purpose of giving jurisdiction to the Federal Court where the lessor could not sue; but the court held that, it appearing that there was a genuine lease, it gave the lessee an estate in the land enabling him to sue in the United States Court, and that the motive for giving the lease was immaterial.

Van Dolsen v. Mayor of New York, 17 Federal, 817, citing and following *McDonald v. Smalley* above.

One of the best discussions of the law and reviews of the authorities on this question that we have found is

Brown v. Fletcher, 235 U. S., 589;

in which it was held that the assignee of the *cestui que trust* having the requisite adverse citizenship could sue in the Federal Court although his assignor could not, the statute as to assignment of choses in action being inapplicable. In delivering the opinion of the court Mr. Justice LaMar said:

> "The restriction on jurisdiction is limited to cases where A is indebted to B on an express or implied promise to pay, B assigns this debt or claim to C, and C as assignee of such debt sues A thereon, or to foreclose the security. Or where A has contracted with B, and B assigns the contract to C who sues to enforce his rights, by bill for specific performance or, by an action for damages for breach of contract. *Shoecraft v. Bloxham, 124 U. S., 730, 735.* * * *
>
> "The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action; for he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age, fifty-five."

In *Crown Orchard Company v. Dennis, 229 Federal, 652; 144 C. C. A., 62,* in the Circuit Court of Appeals, Fourth Circuit, the standing timber on certain tracts was sold and the purchaser assigned his rights to the plaintiff who sued to restrain a subsequent grantee from cutting timber on the land and to establish the rights under the first conveyance. It was objected that inasmuch as both parties to the original conveyance were residents of South Carolina the assignee could not sue in the United States Court. The Court of Appeals sustained the jurisdiction relying upon *Ambler, Eppinger, 137 U. S., 480; 11 S. Ct., 173,* and *Brown v. Fletcher* above, and reviewing cases at length.

Point 3.

Defendant's objection, Point 2, that the return is not made within the time prescribed by rule. It is said in defendant's brief, page 9:

> "Plaintiff did not file copies of the record with the clerk of the District Court of the United States of the Eastern District of Michigan, Southern Division, until March 15, 1924, and the return did not reach the clerk of the Supreme Court until March 17, 1924, as the filing of same will verify."

The printed record, page 54, shows that the time for filing the record was extended to March 18th, 1924. The record was filed with the clerk of the District Court March 15th, 1924, and was received by the clerk of this court March 17th, who declined to docket it because the attorney for the plaintiff is not admitted to practice in this court, informing him that appearance must be entered by a member of the bar of this court, and requesting remittance of the balance of the estimated costs. Accordingly plaintiff caused appearance to be entered by Hon. Alfred Lucking, as attorney, until the case could be reached for argument, and remitted the balance of the estimated costs, upon receipt of which, as appears by the printed record, page 55, the clerk of this court docketed the case, April 2nd, 1924.

This court has held that a motion to dismiss for delay in docketing, comes too late if made after the case has been docketed.

Bingham v. Morris, 7 Cranch, 99.

And that ruling has been followed by the various Circuit Courts of Appeal in interpreting the rule of the Circuit Courts of Appeal, which is identical in phraseology with the rule of this court.

Freeman v. United States (1915), 227 Fed., 732, in which Judge Rogers of the Circuit Court of Appeals, Second Circuit, reviews the decisions at some length.

Altemberg v. Grant (1897), 83 Fed., 980, 28 C. C. A., 244, by Judges Taft and Lurton.

Chicago Dollar Directory Company v. Chicago Directory Company (1895), 65 Fed., 483, 466; 13 C. C. A., 8.

Gilman v. Fernald (1905), 141 Fed., 940; 72 C. C. A., 666.

Love v. Busch (1906), 142 Fed., 429.

Point 4.

The defendant's objection that the extension of the time should have been made by the Circuit Court and not by the District Court from which the appeal is taken, is, we submit, without foundation.

The appeal was granted and the injunction continued by Judge Denison, as circuit judge, because it did not seem to the district judge trying the case consistent to continue an injunction after he had held that he was without jurisdiction; but it is submitted that is no reason why the District Court should not extend the time for perfecting the appeal.

Point 5.

The objection, appellee's Point 4, that the return was not made within the time allowed by the extension is merely a mistake of the appellee. The time was extended to March 18th instead of to March 16th, as assumed by appellee, and the return was in the office of the clerk of this court on the 17th.

Point 6.

The defendant's objection, Point 5, that the failure to file a record until March 15th, shows the appeal was taken for purpose of delay, is equally without foundation. It appears by the record, page 54, that defendant's praecipe for amended record was not filed within the time required by rule. This neglect on the part of the appellee was passed over by us without notice, but we submit that appellee should not accuse us of a fault of which she is equally guilty. We are not aware of any case in which a decision has been rendered in the District Court, an attempted appeal made to the Circuit Court of Appeals, and an appeal perfected and returned to this court in less time than in the case at bar.

Point 7.

Defendant's objection, Point 6, that this court is without jurisdiction, if not covered by the preceding objections, is so vague we are not able to understand it.

Point 8.

Defendant's objection, Point 7, with its many subdivisions, is, we submit, sufficiently answered by saying:

(a) The plaintiff has never had an opportunity to answer any of the matters stated under this objection, because the court dismissed the case on the defendant's motion without giving plaintiff an opportunity to answer. The matters so alleged were never passed upon by the District Court, it being said by the district judge on the argument, that these matters could be considered only by allowing the plaintiff to answer and taking proof, on which the burden would be on the party alleging it. These mat-

ters have no relation to the point of jurisdiction the only question passed on in court below.

(b) The defendant is estopped to make any such contentions after having dealt with the plaintiff as a Delaware corporation and receiving conveyance of these properties from it as such. A court of equity will not allow a grantee who has obtained and claims title through a deed to deny the existence and competence of the grantor.

Carver v. Astor, 4 Peters, 1;
Midhiff v. Colton, 252 Fed., 420; 164 C. C. A., 344.

See, also:

5 A. L. R., 1580-1585, for collection of authorities.

(c) By the Statutes of Delaware, upon paying the back taxes, the plaintiff was reinstated to all its rights as if no proceedings had ever been taken against it. We quote the Statute below:

> "In all cases in which the charter of any corporation created after the tenth day of March, A. D., 1899, has become inoperative or void by proclamation of the governor or by operation of law for nonpayment of taxes; and such corporation has been reinstated and entitled to all its franchises and privileges, such reinstatement shall validate all contracts, acts, matters and things made, done, and performed within the scope of its charter by such corporation, its officers and agents, during the time when such charter was inoperative or void, with the same force and effect and to all intents and purposes as if said charter had at all times remained in full force and effect; and all real and personal property, rights and credits which were of said corporation at the time its charter became inoperative or void, and which were not disposed of prior to the time of such reinstatement, shall be vested in such corporation, after such reinstatement, as fully and amply as they were held by said

corporation at and before the time its charter became inoperative or void; and said corporation after such reinstatement shall be as exclusively liable for all contracts, acts, matters and things made, done, or performed in its name and on its behalf by its officers and agents prior to such reinstatement, as if its charter had at all times remained in full force and effect."

Rev. Stat. Del., 1915, Ch. 66, Sec. 81.

(d) To refute the statement in appellee's motion that the plaintiff is not duly incorporated and is not authorized to do business in Michigan, we have procured and filed with the clerk of this court, a copy of the authorization issued by the secretary of state of Michigan, duly certified under the seal of the secretary of state.

We respectfully submit that the motion is without merit and should be denied with costs.

JOHN R. ROOD,
Attorney for Plaintiff and Appellant.

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BRIEF FOR PLAINTIFF AND APPELLANT AND AFFIDAVIT OPPOSING MOTION OF DEFENDANT AND APPELLEE TO DISSOLVE INJUNCTION OR REQUIRE ADDITIONAL BOND.

The motion of defendant and appellee to dissolve the temporary injunction in this cause or require plaintiff to give an additional bond should be dismissed with costs to plaintiff for the following reasons which we will discuss in the order assigned:

I.

The issues involved in this motion and the reasons assigned for a larger bond are the same as those urged, discussed and passed upon by the Honorable Arthur J. Tuttle, district judge, on the issuing of the first temporary injunction on the filing of the bill in this case, and again before the Honorable Arthur C. Denison, circuit judge, who allowed this appeal to this court and continued the injunction pending such appeal; and a great many of the alleged statements of fact relied upon by defendant are contained in their motion to dismiss or affirm, lately heard before this court and continued until the final determination of the cause on its merits.

II.

This motion is made to the wrong court. The supreme court has consistently made it a practice to leave such matters in the hands of the trial court which is more conversant with the facts.

III.

The allegations made in the alleged statement of facts and the affidavits in support thereof are grossly misleading and untrue.

STATEMENT OF FACTS.

We give a summary of the facts involved in this case.

The property involved in this suit is a ten-story fireproof, steel and concrete apartment building, in Detroit, Michigan, erected on land, a part of which was owned by defendant subject to a mortgage which at the time of the entering into the lease from defendant to plaintiff's assignor as set forth in this case, amounted to about $28,500.00. This mortgage was due and payable and foreclosure proceedings were about to be commenced and would have been commenced, had it not been for the intervention of Robert M. Drysdale, president of plaintiff's assigner, and his assurance to the mortgagee that the mortgage would be paid. A lease was concluded between the defendant as Lessor and plaintiff's assignor as Lessee, by the terms of which plaintiff's assignor was to erect the building in question, and defendant agreed to join in the execution of two mortgages on the property, one in the amount of five hundred thousand ($500,000.00) dollars, and the other in the amount of two hundred fifty thousand ($250,000.00) dollars, the second mortgage being to the Guaranty Trust Company of Detroit, as trustee under a second mortgage bond issue.

The defendant agreed to execute such renewal mortgages as would permit the lessee to pay off the principal of the loans at $30,000.00 per year, and if any dispute arose as to the proposed new mortgage the lease provided for arbitration proceedings to settle the same. (See pages 21 and 22 of printed record.)

At the time of the securing of the two mortgages in question, money rates were exceedingly high and mortgagors were obliged to pay seven (7) per cent interest. As the building in question neared completion money had become plentiful, interest rates were low and in addition the second mortgage bonds against the building could be heavily

discounted and the time was then opportune for both parties to refinance this building which would enable Lessee to pay up an arrearage of taxes and accrued interest which had accumulated during delay in completion of the building and which would have permitted plaintiff's assignor to meet its obligations without default.

Defendant had been in harmony with this plan and urging plaintiff's assignor to secure such a loan up and until such a loan had actually been secured, at which time she then deliberately refused to execute any renewal mortgages, and it became apparent that she and her agents were deliberately trying to cheat and defraud plaintiff's assignor out of its interest in this property.

Defendant contended in this regard that the lease did not obligate her to sign new mortgages until the expiration of the old. At this time the first mortgage of five hundred thousand ($500,000.00) dollars would be due in about three and one-half years. Plaintiff contended that it was not obliged to wait until the last year, month or day of the expiration of such a big mortgage in order to renew the same, but claimed that if it produced a mortgage which actually would decrease the incumbrances against the property and be more advantageous to both Lessor and Lessee as to rates of interest and as to payment of principal maturity that the defendant, according to the terms of her lease, was bound to accept the same and join the plaintiff in the execution of such mortgage. A fulfilment of the lease in this regard by the Lessor would have enabled the Lessee to pay off all obligations against the building, and if there should be any shortage in meeting such obligations its interest in the building would then have been sufficient to enable it to borrow such funds as may have been needed.

In this regard a saving of seventy-five hundred ($7500.00) dollars a year in interest, and seventy-five hundred ($7500.00) dollars a year in principal maturities would have been saved by Lessee and it still would have been within the terms of its lease, and in addition thereto a sum amounting

to substantially $125,000.00 could then have been saved which would have paid for the new loan and all indebtedness against the building, and would have safeguarded the interests of both the Lessor and Lessee and made the property very valuable.

On defendant's breach of her leasehold agreement in this regard it became perfectly apparent that she and her agents were determined to cheat and defraud the Lessee out of all its interest in the property, and it developed that such action would be in line and in accordance with the reputation of the defendant and her agents in questionable real estate transactions in and around Detroit.

The matter of a preliminary injunction came on to be heard before the Hon. Arthur J. Tuttle, District Judge, at which time substantially all of the matters as now alleged by defendant in her motion were taken up, discussed and heard and the District Judge then granted a temporary injunction and again before the Hon. Arthur C. Denison, Circuit Judge, who allowed this appeal, substantially the same matters were again taken up and rehashed and the Circuit Judge then continued this injunction pending appeal. (See opinion and order on pages 4-7 in brief of plaintiff on motion of defendant to dismiss or affirm.)

Both the Hon. Arthur J. Tuttle, District Judge and Hon. Arthur C. Denison, Circuit Judge, were perfectly confident that there would be no diversion of funds from the receipts of operations of this building, and that all receipts would be applied against the obligation of the building and left the way open at any time for the appointment of receiver, if occasion arose.

The order of Hon. Arthur C. Denison has been strictly complied with and a statement of receipts and disbursements filed in the district court in this cause each month, and all receipts from the building have been used to defray the obligations of the operation thereof and the obligations of the mortgages.

Unfortunately, however, this building was opened a few months before a black smallpox epidemic was visited upon Detroit and advertised from coast to coast and at a time also when an acute depression in business developed and which practically emptied a great many hotels and apartments in Detroit, and from which conditions they are just now recovering. In spite of this, however, the plaintiff has operated this building so that the obligations of the building have not materially increased.

Defendant, on July 11, 1924, filed in the district court an application for the appointment of a receiver and twice noticed the same for hearing, but in each instance abandoned its motion and did not proceed with the same for reasons unknown to the plaintiff, and substantially the same allegations were made in such petition for receiver as is now made before this court.

Defendant was repeatedly warned by the lessee at the time of Lessor's refusal to co-operate in the refinancing of the building that if the bonds on the building became scattered in the hands of various holders that the interest of both Lessee and Lessor would be seriously jeopardized and it might then become impossible to secure a new mortgage, but in spite of these warnings defendant persisted in her attempt, evilly and fraudulently to squeeze out the interests of lessee in this property.

Receipts from the building have not been sufficient to satisfy both mortgages and have been largely applied on first mortgage, leaving second mortgage interest accruing.

On December 6th, 1924, the Guaranty Trust Company of Detroit, trustee, under the second mortgage bond issue and under the terms of the second mortgage deed of trust, executed by defendant and plaintiff's assignor, made demand upon plaintiff for the possession of this property, which demand was complied with in accordance with the terms of said deed of trust, and the said Guaranty Trust Company of Detroit, is now in possession of said property under its deed of trust and collecting the rentals thereof.

ARGUMENT.

One.

The matters now urged before the court on this motion are substantially the same as urged before the District Judge on granting the first temporary injunction, and again before the Hon. Arthur C. Denison, Circuit Judge, on the granting of the injunction pending appeal. Both of these judges were fully advised in the premises, heard the affidavits on both sides, and both without hesitation granted the injunctions. (See opinion and order of Hon. Arthur C. Denison, pages 4-7 of brief for plaintiff on motion of defendant to dismiss or affirm.)

If defendant was dissatisfied with these decisions she had the right to appeal to the Circuit Court of Appeals under Section 129 of the Judicial Code, being 36 Statutes at Large, 1134. By failure to appeal from the order of Hon. Arthur C. Denison, she has lost her right to complain of matters appertaining to this injunction. We do not claim that she has lost her rights to have the merits of this appeal determined but as to matters appertaining to the injunction she has had her day in court.

Chaplin v. Yellow Lumber Company, 143 Fed. Rep., 201, on page 205.

Two

Rule 74 of Equity Rules promulgated by this court leaves in the District Court the right to grant, refuse or modify injunctions pending appeals.

This court, in the case of *Hovey v. McDonald, 109 U. S., 150,* held that this rule established the procedure for the District Courts to carry into effect their inherent right to regulate these matters pending appeal.

On appeals to the Supreme Court from the orders of District Courts on injunction matters appertaining to the enforcement of State Laws which proceedings come under Section 266 of the Judicial Code, 36 Statutes at Large, 1162, and appeals therefrom to this court under Section 266 of the Judicial Code, this court has held in

Cumberland Tel. Company v. Pub. Serv. Comm., 260 U. S., 212,

that while the granting of such an injunction pending appeal is within the power of this court that applications therefore will generally be referred to the court who heard the case on its merits, and that without abdicating its power to grant an application to preserve the *status quo* and the continuance of an injunction and conceiving that exceptional cases may arise, the Supreme Court is generally inclined to refer such applications to the judges who have heard the whole matter. (See, also, *Zoline on Fed. Appellate, Jurisdiction and Procedure, on page 176.)* This was a case of appeal from an order allowing an injunction and not an appeal from the merits of the case.

It seems then that upon an appeal from a final order or decree, such as the case at bar, the District Judge who heard the case on its merits has the exclusive right to make all necessary orders appertaining to injunctions under Equity Rule 74 promulgated by this court and the agrieved party has the right of appeal therefrom to the Circuit

Court of Appeals, and that where appeals are allowed on interlocutory orders direct to the Supreme Court, that in such cases the Supreme Court, without abdicating its power to hear the same has adopted the rule of leaving all such matters to the judges who have heard the whole matter.

Three.

Refutation of defendant's alleged statement of facts.

The allegations in the alleged "Statement of Facts" and the affidavits supporting the same in defendant's motion, are largely untrue, and substantially the same allegations have been made before the District Judge and the Circuit Judge who allowed this appeal. Answering the same in their order, plaintiff says:

The defendant attempts to insinuate that Robert M. Drysdale, president of plaintiff's company, dealt unfairly with the defendant, an elderly lady. As a matter of fact the defendant and her nephew, Donaldson Craig, who largely transacts her business and whose affidavit accompanies that of Lavina B. Donaldson, defendant, have a well known reputation in Detroit, as being real estate "Sharpers" and for fostering litigation.

The Realty Holding Company was organized in 1920 by some bankers, real estate men of Detroit, and Robert M. Drysdale, not for $1,000,000 as stated in the alleged statement of facts, but for $50,000.00 authorized preferred stock and 5,000 shares of common stock and real estate holdings of the approximate value of $25,000.00 was turned into this company. The statement on page 5, second paragraph of defendant's printed motion that "This corporation never had functioned nor did it transact any business whatsoever until the transaction so-called in question took place," is absolutely false and untrue, and the affidavit of Lavina B. Donaldson, defendant, on page 17 of this printed motion, paragraph 2, that she

has read "statement of facts" made by counsel in support of the motion; "that the facts therein stated are true of her own knowledge," is likewise a false affidavit. Defendant in her sworn answer and cross-bill, paragraph 6, on page 26 of the printed record, there admits receiving from this plaintiff deeds to the properties transferred by the plaintiff to the defendant as security for the erection of the building in question, the value of which properties as alleged in plaintiff's bill of complaint, paragraph 6, on pages 2 and 3 of the printed record is set at $25,000.00, which conclusively proves that plaintiff had functioned and was not inoperative.

Shortly before summary proceedings in Michigan Courts were commenced by defendant, the plaintiff corporation took by assignment from the Clifford Land Company all of the interest of Clifford Land Company in the building in question in this suit so as to enable the plaintiff to more fully protect its property which it had turned over to this defendant as security for the completion of said building.

Every time this matter has been before any court or judge, the defendant has placed great stress upon the point that the charter of plaintiff's corporation had been suffered to lapse in Delaware by reason of nonpayment of taxes in Delaware and that the charter was not reinstated until July 18th, 1923, one day after commencement of this suit, although the proceedings, affidavits and all matters to accomplish such reinstatement had been filed previous to that time. The Statutes of Delaware clearly cover this point and clearly specify that all rights and property held by the corporation at the time its charter may have become inoperative or void and which were not disposed of prior to the time of reinstatement, shall be vested in such corporation after such reinstatement as fully and amply as if the charter had never become inoperative. (See page 14, printed brief of plaintiff on motion to dismiss or affirm.)

It is admitted that the Clifford Land Company, the assignor of plaintiff, has no property, it having assigned all of its property to the plaintiff. The Realty Holding Com-

pany, the plaintiff and Robert M. Drysdale are not irresponsible and uncollectible as alleged by the defendant, but on the contrary are responsible and collectible. The Realty Holding Company has a substantial sum of money invested in this enterprise although it was clearly contemplated at the inception of this transaction that plaintiff's assignor should put nothing into the enterprise and that defendant should put only her equity in a part of the land on which the building is located and which at that time was about to be foreclosed upon. (See exhibit attached to defendant's answer and cross-bill, page 32 printed record) and since the commencement of this suit alone, the plaintiff has put into this enterprise substantially $25,000.00 in cash which is shown by the auditor's report of receipts and disbursements in connection with this building and which copies from time to time have been furnished this defendant.

The statements that Mr. Drysdale has openly and repeatedly made threats to harass and embarrass this defendant is wholly false and without any foundation whatsoever. Plaintiff admits that its president, Mr. Drysdale did caution defendant, however, that if she persisted in violating her written contract to assist in refinancing this building, that in the end it might result in a loss of the building to both parties, and the said Drysdale did claim that if defendant broke her contract that the plaintiff would expect full damages in a proper action to collect the same.

Rentals and income from this building have not been used to suit the caprices of Robert M. Drysdale or any other person, but every dollar thereof has been used to defray the expense of the operation of the building and to pay legitimate claims against the same, and a complete audit thereof by certified public accountants agreeable to the bankers controlling the two mortgages have been filed each month in the District Court, and no other receipts from said building have been received except as shown in said report.

Defendant knows that there is not $94,644.00 unpaid on interest of the first mortgage of $500,000.00 as alleged on page 10 of its printed motion. There is less than $36,000.00 of interest due on said mortgage.

All defendant invested in this enterprise was her equity of redemption under a mortgage on a portion of the land on which this building is located which she owned at the time of making the lease in question.

There is no question but that foreclosure proceedings on behalf of the mortgage interests would jeopardize not only defendant's equity in the property but also that of the plaintiff. It is apparent that the defendant would rather jeopardize her interest in the entire property in an effort to cheat and defraud the planitiff out of its interest so she could get the whole interest, than live up to her written agreement with respect to the property.

Since this action was commenced by the plaintiff, the plaintiff has invested in this project from sources other than the income from the building, approximately $25,000.00, and in addition thereto has procured the building to be completely furnished and equipped without which furniture it could not have been rented at all.

SUMMARY.

Defendant leased to plaintiff's assignor the ground on which the building in question was erected. Plaintiff's assignor was to and did pay off an existing mortgage of about $28,500.00 and paid the defendant about $1500.00 in cash, making a total of $30,000.00 paid defendant out of the mortgage proceeds. Plaintiff's assignor procured the building in question to be financed and constructed and defendant gave plaintiff's assignor the thirty-three-year lease in question and signed both construction mortgages with plaintiff's assignor, and agreed with plaintiff's assignor to sign such renewal mortgage as would permit the plaintiff's assignor to pay off the mortgage incumbrance at the rate of $30,000.00 per year.

It is perfectly apparent that defendant procured plaintiff's assignor to finance and construct this building and complete it to the point of occupation, and then deliberately violated her written agreement to execute renewal mortgages in an apparent effort to defraud the plaintiff's assignor out of all its interest in the property, and by so doing to take away from the plaintiff the real estate securities which it had deposited with defendant to guarantee completion of the building and payment therefor.

To the query of Hon. Arthur J. Tuttle, District Judge, and Hon. Arthur C. Denison, Circuit Judge, when this matter has been before the court for the granting and continuance of the temporary injunction as to the reason why defendant had not better refinance the mortgages and safeguard her property, there has been absolutely no satisfactory answer or reasonable explanation therefor.

The plaintiff in this cause is attempting to prevent a threatened invasion of its estate in this property by the defendant and to prevent the defendant from taking any advantage of her own default in the terms of the lease.

As was pointed out by the Hon. Arthur J. Tuttle, District Judge, and the Hon. Arthur C. Denison, Circuit Judge, all that either party could do would be to operate the building and apply the proceeds on the mortgage indebtedness. This is what plaintiff has done and in addition thereto invested substantially $25,000.00 of its own resources in the enterprise since this suit was commenced.

The Guaranty Trust Company of Detroit, trustee under the second mortgage bond issue is now in possession of the building and collecting the rents, so this alone should be a sufficient answer to defendant's motion, as the Trust Company will, of course, be obliged to apply all the receipts from the building against the obligations thereof the same as has heretofore been done by this plaintiff.

The matters in plaintiff's motion are simply a rehash of alleged facts and arrangements heretofore and already presented, and her motion should be dismissed with costs to the plaintiff.

JOHN R. ROOD,
Attorney for Plaintiff and Appellant.

Business Address:
Dime Bank Building,
Detroit, Michigan.

In The

Supreme Court of the United States

October Term, 1923.

No. 929.

REALTY HOLDING COMPANY, a Delaware Corporation,
Plaintiff and Appellant,

v.

LAVINA B. DONALDSON,
Defendant and Appellee.

State of Michigan,
County of Wayne—ss.

ROBERT M. DRYSDALE, being duly sworn, deposes and says that he is the president and general manager of Realty Holding Company, the plaintiff in the above entitled cause, and makes this affidavit in opposition of motion of defendant to dissolve the injunction in this cause or require plaintiff to give additional bond, and that this deponent has read the brief opposing such motion and the "statement of facts" therein contained and the "Refutation of defendant's alleged statement of facts" contained in said brief, and all allegations in said printed brief, and that this deponent knows the contents thereof, and that the facts therein stated are true of his own knowledge except as to matters therein

stated upon information and belief, and as to such matters he believes it to be true.

Robert M. Drysdale.

Subscribed and sworn to before me this 19th day of December, 1924.

Grace Geary,
Notary Public,
Wayne County, Michigan.

My commission expires February 7, 1927.